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U.S. Citizenship and Immigration Services

**PUBLIC COPY**

[redacted]

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MAR 22 2004

FILE: EAC 02 195 52727 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a trading firm and wholesaler. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 2024.5(d). The petition's priority date in this instance is April 27, 2001. The beneficiary's salary as stated on the labor certification is $30,850 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated November 1, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE required the petitioner's federal income tax return, annual report, or audited financial statement for 2001, as well as Wage and Tax Statements (Form W-2) to show wage payments to the beneficiary. The petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, for the fiscal year (FY) ending September 30, 2001 was in the record. It reflected taxable income before net operating loss deduction and special deductions of $15,875.

Counsel submitted, in response to the RFE, the petitioner's 2001 Form 1120 for the year ending September 30, 2001. It reported taxable income of $9,613 before net operating loss deduction and special deductions.

The director construed the petitioner's accounts receivable as a write-off of bad debts and concluded that its liabilities exceeded its assets. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

Counsel states on appeal that:

> All the bad debts should be listed in line 15 of Form 1120 among the deductions and carry over the allowance for bad debts to Schedule L (Exhibit B3).

Since nothing is listed on line 15 of any tax return, a deduction for bad debts was, evidently, not intended. Counsel's brief does not identify the tax return to which the text refers, though it is probably the Form 1120 for 2001. Nothing on the Form 1120 supports counsel's idea that an item carries over to Schedule L. Normally, schedules supply data, *vice versa*, to the Form 1120. Counsel claims that accounts receivable, as found in line 2a/2b of Schedule L, are within the petitioner's terms of 90-120 days credit to customers. Counsel attaches IRS instructions in exhibit B2, but they do not speak to the terms of credit or the treatment of lines 2a/2b of exhibit L.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. Nonetheless, the petitioner may explain the entries on Schedules L and Forms 1120 on remand.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The decision stated the belief that the beneficiary was attempting to petition for himself. The decision, however, made no finding and reached no conclusion.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 indicated that the petitioner intended to employ the beneficiary in the position of an administrative assistant at the rate of $30,850 per year in duties related to that job.

Counsel avers on appeal that:

> ... Petitioner's U.S. Corporation Income Tax Return states that the petitioner is 100% owned by [TMIE] in China.
>
> Under the direction and supervision of [JRS], the President of TMIE, the petitioner has been receiving operation and marketing supports from TMIE. There are eight staff members of TMIE directly involve [sic] in various business activities to support petitioner's operations in the United States, they are as follows: [named].

The list does not include the beneficiary. The omission of the beneficiary is significant. Part B, Block 15a of the Form ETA 750 states that the beneficiary has worked at the petitioner's site in the United States, ostensibly as an administrative assistant, since April 2001. Form W-2 for calendar year 2001 shows payments of the petitioner from the beneficiary of $25,200. Line 12 of the tax returns for 2000 and 2001 record such payments as "Compensation of Officers," a discordant category for an administrative assistant.

JRS states that the beneficiary worked from March 1991 to December 1994, as an administrative assistant, in duties identical to those stated in Part A, Block 13 of the Form ETA 750. Then, the Form ETA 750, in Part B, reveals, the beneficiary was a manager with TMIE, for six years most recently, from January 1995 to March 2001 at TMIE, [redacted] The Form ETA 750, in Part A, however establishes a position of administrative assistant, not a manager. If the petitioner really intends to employ the beneficiary as a manager, the position does not comply with the terms of the labor certification.

A labor certification for a specific job offer is valid only for the particular job opportunity. 20 § C.F.R. 656.30(C)(2). It seems that the petitioner intends to employ the beneficiary as a manager, outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283.

Counsel says, responding to the imputation in the decision, "With the evidence presented herein, it has [been] established that the instant petition is not a self-petition." The petitioner has never had the opportunity to address the material issues of qualifications and the bona fides of the job offered.

Consequently, the petitioner has established neither that the parent corporation intends to demote its manager to an administrative assistant nor that the petitioner will employ the beneficiary in the duties of an administrative assistant, as set forth in the job offer portion of the Form ETA 750. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). *Matter of Romano*, 12 I&N Dec. 731.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The evidence does not now reasonably permit the inference that the beneficiary will work in the administrative assistant's position at the proffered wage. The decision of the director is withdrawn, and the petition is remanded to the director for consideration of the bona fide intent to employ the beneficiary in the proffered job.

Moreover, AAO cannot determine from the present record whether the petitioner might have had sufficient net current assets to establish the ability to pay the proffered wage. Net current assets are the difference of current assets minus current liabilities. The director may also consider wages that the petitioner, but not other parties, paid to the beneficiary from the priority date and continuing until the beneficiary obtains lawful permanent residence.

The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner should have the opportunity to meet that burden.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.